



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 2 OF 2020

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF COURT ACT AND OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF ARTICLES 2, 3, 10, 21, 22, 23, 43, 47, 156, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF TECHNICAL TRAINING ACT

AND

IN THE MATTER OF ILLEGAL RECALLING, REHIRING AND RE-EMPLOYING OF THE FORMER PRINCIPALS,

PRINCIPALS AND STAFF WHO RETIRED FROM 2015 TO DATE

CYPRIAN OCHIENG FEDHA.....PETITIONER

v

PRINCIPAL SECRETARY, MINISTRY

OF EDUCATION, THE STATE DEPARTMENT OF

VOCATIONAL & TECHNICAL TRAINING.....1st RESPONDENT

CABINET SECRETARY, MINISTRY

OF EDUCATION.....2nd RESPONDENT

THE ATTORNEY GENERAL.....3rd RESPONDENT

JUDGMENT

1. Cyprian Ochieng Fedha (the Petitioner) lodged a Petition with the Court on 17 January 2019 alleging that the decision of the Principal Secretary and the Cabinet Secretary, Ministry of Education, to recall trainers of national polytechnics and technical colleges who had retired in 2015 was unconstitutional and without a legal basis.

2. The Petitioner sought the following remedies:

- (i) A declaration that the actions of the 1st 2nd and 3rd Respondents were against public policy, the Constitution and the relevant statute.
- (ii) A declaration that the 3rd Respondent breached Article 156 in failing to promote and protect the rule of law and defend public-interest by failing to give proper legal advice and failing to carry their constitutional mandates.
- (iii) The Respondents to pay the Petitioner's costs of the Petition in any event.

3. Filed with the Petition was a Motion under a certificate of urgency, but on 19 September 2019, the parties indicated that they wished to file and exchange submissions on the Petition (Director of Technical Education filed a replying affidavit on 13 March 2019).

4. The Court directed the filing and exchange of submissions, and the Petitioner filed his submissions on 19 February 2020.

5. The Petitioner identified the Issues for determination as:

- (i) Whether the Petitioner's rights have been violated and whether the Petitioner has the locus to bring this suit?
- (ii) Whether the reappointment was lawful?
- (iii) Whether the Petitioner is entitled to the remedies sought?

6. The Respondents filed their submissions on 15 March 2021, and they raised the following issues:

- (i) Whether the Petition is properly before this Court?
- (ii) Whether the Petitioner has pleaded the rights allegedly threatened or violated with the specificity and precision required by law?
- (iii) Whether the Petitioner's rights were violated in the reappointment notice?
- (iv) Whether the Petitioner is entitled to the remedies sought?

7. The Court has considered the Petition, affidavits and submissions.

Locus and competence

8. The Respondents challenged the competence of the Petition on the ground that the Petitioner had not demonstrated an employment nexus with the Respondents.

9. According to the Respondents, the cause of action presented by the Petitioner did not fall within the categories outlined in section 12 of the Employment and Labour Relations Court Act.

10. The Court has relooked at the Petition.

11. The factual background against which the Petitioner challenged the Respondents' decision was the recruitment of persons who had retired from the public service back into the public service.

12. Upon recall, these persons would serve under contracts of service, and the Court finds that the dispute falls within its jurisdiction by dint of section 12(1)(a) of the Employment and Labour Relations Court Act as read with Articles 22 and 23 of the Constitution.

Specificity of the pleadings

13. The Respondents also challenged the Petition on the ground that the Petitioner had failed to plead his case with precision to enable them to know the case to meet.

14. In this regard, the Respondents asserted that the Petitioner had not outlined the rights violated, and the manner of violation and reliance was placed on *Anarita Njeru Karimi v R* (No. 1) (1978) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Ors* (2013) eKLR.

15. The gravamen of the Petition, as the Court understands the same, can be gleaned from paragraphs 19, 20 and 21.

16. In the paragraphs, the Petitioner was questioning the legality of the decision of the Respondents to recall retired employees without going through public participation and competitive recruitment, amongst other grounds.

17. Article 232 of the Constitution has set out the values and principles that underpin the public service, and these include transparency, involvement of the people, competition and merit in recruitment.

18. The Court finds that the Petition, though poorly drafted, outlined a case which a reasonable person would understand, and it should not be rejected based on lack of precision in drafting.

19. In reaching the conclusion, the Court is alive to the recognition of the epistolary jurisdiction in this jurisdiction under Article 22(3) of the Constitution.

Merits of the Petition

20. In challenging the lawfulness of the decision of the Respondents to recall retired trainers, the Petitioner argued that they had taken over the work of some 300 trainers.

21. The Petitioner also contended that not all the trainers who had retired had been considered for a recall as only those who had retired in 2015 were recalled.

22. The Respondents explained in the replying affidavit that 136 new technical training institutes had been equipped and with enhanced student enrolment and it was, therefore, necessary to recall the trainers on local agreement terms for 1-year.

23. The Respondents thus contended that the recall of the retired employees was done within the law as the same had been approved by the Public Service Commission on 20 December 2018.

24. The Public Service Commission has been clothed with the constitutional authority to establish offices in the public service as well as the appointment of persons to hold public office.

25. Section 45 of the Public Service Commission Act, 2017 envisages the engagement of persons within the public service on contracts of not less than 12 months and not more than 5 years.

26. However, as already stated hereinabove, Article 232 of the Constitution has set out the values and principles that underpin the public service and these include transparency, competition and merit in recruitment.

27. The Respondents did not explain the rationale for restricting the re-engagement on local agreement to trainers who had retired in 2015.

28. Without any explanation as to the criteria or factors used to recall the trainers who retired in 2015 and not before, the Court agrees with the Petitioner that the engagement of the retired trainers did not meet the constitutional expectations of transparency, competition and merit.

Conclusion and Orders

29. The recalled trainers were engaged on 1-year local agreement terms, which have since lapsed.

30. There was no evidence that the contracts were extended beyond 12 months.

31. In light of the foregoing, the Court will only grant one of the substantive orders sought by the Petitioner by ordering that:

- (i) A declaration be and is hereby issued that the decision of the 1st 2nd and 3rd Respondents to restrict re-engagement of retired trainers to only those who had retired in 2015 were against values and principles underpinning the public service.

32. The Petition was in the public interest. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For Petitioner Mr Mwamu instructed by Mwamu & Co. Advocates

For Respondents Mr Kobimbo, Litigation Counsel instructed by the Office of the Attorney General

Court Assistant Chrispo Aura